a

RE LIM AH HEE, EX P PERWIRA AFFIN BANK BHD

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
b SITI NORMA YAAKOB JCA
MOKHTAR SIDIN JCA
[CIVIL APPEAL NO: W-03-51-97]
18 FEBRUARY 2000

c ***BANKRUPTCY:*** *Notice - Amount claimed - Interest on judgment sum - Not exceeding six years from date due - Section 6(3) Limitation Act 1953 - Excessive demand and its consequence upon validity of notice*

CIVIL PROCEDURE: *Appeal - Grounds of appeal - Issue abandoned in lower court - Whether improper to raise issue at higher court*

d ***CIVIL PROCEDURE:*** *Interest - Judgment debt - Section 6(3) Limitation Act 1953 - Interest not exceeding six years from date due*

The appellant applied to set aside the bankruptcy notice on two grounds, *ie*, (i) the respondent failed to obtain leave to execute judgment after six years had lapsed from the date of the judgment; and (ii) the
e bankruptcy notice was void *ab initio* since the sum claimed in the notice was partly statute barred pursuant to s. 6(3) Limitation Act 1953. The appellant's application was dismissed by the SAR and on appeal, the High Court judge affirmed the SAR's decision. The appellant filed further appeal to the Court of Appeal. In the High Court, the appellant
f abandoned the first ground but decided to pursue both in the Court of Appeal.

Held:
Per Mokhtar Sidin JCA

g **[1]** A claim for interest exceeding six years on a judgment obtained will nullify a bankruptcy notice.

[2] A judgment creditor can only claim interest on a judgment sum not exceeding six years from the date it is due.

h **[3]** It is not proper for a party to raise an issue which has been abandoned earlier in the lower court.

[Appeal allowed.]

i

*[**Bahasa Malaysia** Translation Of Headnotes]*

Perayu memohon agar notis kebankrapan diketepikan atas dua alasan, iaitu, (i) responden gagal memohon kebenaran untuk melaksanakan penghakiman selepas enam tahun berlalu dari tarikh penghakiman; dan (ii) notis kebankrapan itu *void ab initio* kerana sebahagian daripada jumlah yang dituntut didalam notis tersebut telah dibatasi statut selaras dengan s. 6(3) Akta Had Masa 1953. Permohonan perayu telah ditolak oleh Penolong Kanan Pendaftar ('PKP') dan pada rayuan, hakim Mahkamah Tinggi telah mengesahkan keputusan PKP itu. Perayu seterusnya merayu ke Mahkamah Rayuan. Semasa di Mahkamah Tinggi, perayu telah mengabaikan alasan pertama tetapi mengambil keputusan untuk meneruskan dengan kedua-dua alasan diperingkat Mahkamah Rayuan.

Diputuskan:
Oleh Mokhtar Sidin HMR

[1] Tuntutan untuk faedah yang melebihi enam tahun dari tarikh penghakiman dimasukkan akan membatalkan notis kebankrapan.

[2] Pemiutang penghakiman hanya boleh menuntut faedah ke atas jumlah penghakiman jika ianya tidak melebihi enam tahun dari tarikh ianya genap masa kena bayar.

[3] Adalah tidak wajar bagi satu pihak untuk membangkitkan satu isu yang telah terdahulunya diabaikan di mahkamah rendah.

[Rayuan ditolak.]

Case(s) referred to:
Lowsley & Another v. Forbes [1998] 3 All ER 897 ***(foll)***
Wangsini Sdn Bhd v. Grand United Holdings Bhd [1997] 5 CLJ 664 ***(foll)***
WT Lamb & Sons v. Rider [1948] 2 KB 331 ***(refd)***

Legislation referred to:
Bankruptcy Act 1967, s. 3(2)(ii)
Limitation Act 1953, ss. 4, 6(3)
Rules of the High Court 1980, O. 46 r. 2(1)(a)

Limitation Act 1980 [UK], s. 24(1), (2)

For the appellant - M Manoharan; M/s Karpal Singh & Co
For the respondent - Lee Wooi Mien (Lee Yin Paik with her); M/s Shook Lin & Bok

[Appeal from High Court, Kuala Lumpur; Bankruptcy No: D5-29-840-96]

Reported by Izzaty Izzuddin

JUDGMENT

Mokhtar Sidin JCA:

Perwira Affin Bank Berhad (formerly known as Perwira Habib Bank Malaysia Berhad), the respondent in the present appeal, was the judgment creditor in the court below whilst the appellant, Lim Ah Hee, was the judgment debtor. On 28 March 1996, the respondent issued a bankruptcy notice against the appellant claiming the sum of RM6,388,344.68. This sum represented the amount due on a final judgment obtained by the respondent against the appellant in the High Court at Kuala Lumpur on 23 October 1987 *vide* Civil Suit No. C-23-905-86. The appellant made an application to set aside the bankruptcy notice. On 19 March 1997 the senior assistant registrar dismissed the appellant's application with costs. The High Court dismissed the appellant's appeal. The appellant then appealed to this court.

In the court below, counsel for the appellant raised two issues, namely:

(1) the respondent did not obtain leave of the court to execute the judgment after more than six years had lapsed from the date of the judgment pursuant to O. 46 r. 2(1)(a) of the Rules of the High Court 1980;

(2) the respondent had incorporated in the bankruptcy notice statute barred interest and under s. 6(3) of the Limitation Act 1953, (Act 254), the bankruptcy notice is void *ab initio.*

Before us, the same two issues were raised by the learned counsel for the appellant although he had in the High Court abandoned the first issue when he was satisfied that leave had been obtained under O. 46 r. 2(1)(a) of the Rules of the High Court. As such the learned judge only decided on the second issue.

Before us, counsel for the appellant submitted on both issues. We are not sure why counsel changed his stance. He went on to address us on the second issue first. He submitted that the interest claimed in the bankruptcy notice is barred by s. 6(3) of the Limitation Act. As such the bankruptcy notice is void *ab initio* because the amount claimed exceeded the actual amount due. Section 6(3) of the Limitation Act makes the following provisions:

> 6. Limitation of actions of contract and tort and certain other actions
>
> (3) An action upon any judgment shall not be brought after the expiration of twelve years from the date on which the judgment became enforceable and no arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

Counsel for the appellant relied on English authorities. The English provision equivalent to s. 6(3) of the Limitation Act is s. 24 of the English Limitation Act 1980 which provides as follows:

> (1) An action shall not be brought upon any judgment after the expiration of six years from the date on which the judgment became enforceable.
>
> (2) No arrears of interest in respect of any judgment debt shall be recovered after the expiration of six years from the date on which the interest became due.

The learned judge in the court below considered the case of *W.T. Lamb & Sons v. Rider* [1948] 2 KB 331. In that case the Court of Appeal in its decision made a distinction between suing on a judgment and enforcing it. Relying on the judgment of Scott LJ at pp. 337-338 in that case, the learned judge in the court below came to the following conclusion:

> The matter before me relates to bankruptcy action taken by the judgment creditor. In my view, going by the meaning of "writ of execution" in Order 46 rule 1 of the Rules of the High Court 1980, bankruptcy actions do not come within the meaning of writ of execution and there may be no need even to get leave under Order 46 r. 2 to proceed with the bankruptcy actions. The issue of a bankruptcy notice is not a form of execution (see *Re A Bankruptcy Notice* (1898) at page 387). (Page 764 of the Supreme Court Practice 1997, vol. 1).
>
> As seems clear to me that "action" under section 6(3) of the Act does not cover execution proceedings and what more the bankruptcy actions, it follows therefore that the bankruptcy actions do not come within the ambit of section 6(3) of the Act and is therefore not applicable.
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> As section 6(3) of the Act refers to "actions on judgments" it would seem only sensible to interpret both limbs as applying in the same way, that is, confining to actions on judgments and excluding execution proceedings including bankruptcy actions. In my view the bankruptcy actions just like execution proceedings is the taking of a further step in an existing action rather than the commencement of a new action. In other words the bankruptcy actions do not operate on the concept of the cause of actions as is intended by the provisions of the Act.

It was contended by the learned counsel for the appellant that the learned High Court judge had erred in his decision when he relied on the principles laid out in *W.T. Lamb's* case. The learned counsel submitted that in view of the decision of the House of Lords in *Lowsley and Another v. Forbes (t/a LE Design Services)* [1998] 3 All ER 897 the principles laid out in *W.T. Lamb* is not good law anymore. When the learned judge of the High Court gave his decision, the case of *Lowsley* had not been decided yet and as such he did not have the benefit of that decision. When the learned judge gave his decision, *W.T. Lamb* was still good law. It was subsequently overruled by *Lowsley's* case. It is not fair for counsel to submit that the learned judge had erred. The law has changed in view of *Lowsley's* case.

Counsel for the appellant then cited the judgment of Lord Lloyd at pp. 906-907:

> With regret, however, I cannot agree with the Court of Appeal on the second question. There would seem to be no reason why the relevant words in s. 24(2) 'no arrears of interest ... shall be recovered' should not be given their ordinary meaning, so as to bar execution after six years in respect of all judgments. It is what the words say. 'Recovered' has a broad meaning. It is not confined to recovery by fresh action.
>
> But the Court of Appeal has held that the limitation to six years' interest on judgments applies only in a case of actions on judgments, and not to execution of judgments generally. In support of this construction, the Court of Appeal relied strongly on the fact that sub-ss. (1) and (2) were part of the same sentence, joined only by a comma, when they were enacted as s. 2(4) of the 1939 Act. In the first half of the sentence is confined to actions on judgments, Parliament must have intended that the second half of the sentence should be similarly confined. But in my view this does not follow as a matter of language. 'Any judgment' in the first half of the sentence means, quite literally, any judgment. There is no warrant for limiting 'interest in respect of any judgment debt' in the second half of the sentence to interest in respect of a judgment in an action on a judgment, even if one could think of any good reason why Parliament should so have provided.
>
> Nor is the Court of Appeal's reasoning supported by the legislative history. If it is legitimate to go back to the 1939 Act in order to construe s. 24(2) of the 1980 Act, then it is equally legitimate to go back to the 1833 Act, where, as has already been seen, the provisions which are now contained in s. 24(1) and (2) were in separate sections, namely ss. 40 and 42. Section 42 was a freestanding provision which limited the recovery of interest to a period of six years from when it became due. The provision was later applied to judgment debts carrying interest under s. 17 of the Judgment Acts 1838.
>
> So as to the second question I prefer the decision of Tuckey J, who held that s. 24(2) limits recovery by way of execution on all judgments to a period of six years, including the judgment in this case. ...

It was held by the House of Lords that on its true construction, the word "action" in s. 24(1) of the 1980 Act means a fresh action, and did not include proceedings by way of execution. Accordingly, the section did not bar execution of a judgment after six years, but only barred the bringing of a fresh action on the judgment. However, there was no reason why the words "no arrears of interest ... shall be recovered" in s. 24(2) should not be given their ordinary meaning so as to bar execution after six years in respect of all interests. The House of Lords then went on to decide that the learned judge was right to reduce the interest and limit it to six years, and allowed the appeal to that extent.

In the present case we are of the opinion that counsel for the appellant was right when he submitted that the decision of *Lowsley* affected the decision of *W.T. Lamb* in that though there is no bar in the execution of a judgment after six years, the recovery of interest is limited to six years only. In view of this the decision of the learned judge relying on the decision of *W.T. Lamb* cannot be upheld.

From the authorities it is clear that the local courts had followed the decision of *Lowsley's* case in respect of limitation to interest. In *Wangsini Sdn. Bhd. v. Grand United Holdings Bhd.* [1997] 5 CLJ 664; [1997] 3 AMR 2976, it was held that s. 6(3) of the Limitation Act 1953, will have a telling effect on the statutory notice of demand as the petitioner is only legally entitled to claim interest on the judgment in default obtained on 19 January 1990 for six years from the date on which the interest became due. It is clear from this authority that a bankruptcy notice cannot claim interest exceeding six years on a judgment obtained. It is also clear that a claim for interest exceeding six years will nullify the bankruptcy notice.

Counsel for the respondent submitted that the appellant had filed two applications which were dismissed by the senior assistant registrar. Being dissatisfied with that decision, the appellant then appealed to the judge in chambers. Before the appeal could be heard on its merits, counsel for the appellant raised two preliminary issues. Counsel for the respondent submitted further that before the learned judge, the appellant abandoned the first issue but proceeded with the second issue. The learned judge then went on to decide on the second issue against which decision the appellant is now appealing. Counsel for the respondent contended that it was not proper for the appellant to raise the first issue since he had abandoned it at the High Court. We agree with the respondent that it is not proper for the appellant to raise the first issue before us since it was abandoned in the High Court. As such we made it clear that we will only consider the second issue which is in respect of limitation of interest.

In respect of this issue counsel for the respondent voiced her objection on the way the appellant raised the issue before the learned judge because it did not conform to s. 3(2)(ii) of the Bankruptcy Act where a seven-day notice must be given after receipt of the bankruptcy notice. The bankruptcy notice was served on 3 June 1996 and the issue was raised only on 7 May 1997. This issue was raised as a preliminary objection. From the record before us it is clear that counsel for the respondent did not raise any objection to the issue being raised before the learned judge. The learned judge then went on to hear the arguments and then made his ruling. It is too late for the respondent to raise this objection before us. Anyway, this

is a point of law which in our opinion could be raised at any time. Failing on this objection, counsel for the respondent submitted that the appellant should plead that issue as a defence as required by s. 4 of the Limitation Act. Again, from the record it is clear that counsel for the respondent did not raise her objection or argued this objection before the learned judge. As such it is too late for her to raise it now. In fact she allowed the judge to hear the arguments on the issue of limitation raised by the appellant, who made a ruling on it in favour of the respondent.

In respect of the issue itself, counsel for the respondent submitted that the learned judge came to the correct conclusion when he made a ruling that the limitation is not applicable to the interest claimed in the present appeal. Counsel submitted further that the Limitation Act is not designed nor intended by Parliament, *inter alia*, for the purpose of calculating the amount of interest due under a judgment in a bankruptcy notice. The Limitation Act is aimed at providing a timeframe for commencing suits or actions and not for quantification purposes. She went on to say that the appellant's argument that the respondent could only claim interest for six years calculated backwards from the date of filing of the bankruptcy notice was wrong. The correct interpretation of the second limb of s. 6(3) of the Limitation Act concerns post judgment interest and not the award of interest up to the date of judgment (pre-judgment interest) as the latter together with the principal sum awarded in the judgment themselves constitute the judgment debt. Any interest due after the date of judgment is limited to six years and a creditor can recover it by way of a fresh action.

The learned judge made his ruling only in respect of the second limb whereby he decided that there is no limitation to interest claimed because of the decision in *W.T. Lamb*. Since *W.T. Lamb* had been overruled by *Lowsley's* case under the law as it is now, a judgment creditor can only claim interest on a judgment sum not exceeding six years from the date it is due. In the present case the respondent is only entitled to claim interest six years from the date of judgment.

The present appeal is only in respect of the ruling made by the learned judge on limitation of interest to be claimed. We are not sure whether the bankruptcy notice included a claim of interest exceeding the limitation period. If it is so then the bankruptcy notice is void.

For the above reasons we allowed the appeal by the appellant with costs here and below with the deposit to be refunded to the appellant.